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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1871

UNITED STATES OF AMERICA,

Plaintiff,

against

FRANK W. SNEPP, III,

Defendant.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., P.E.N. AMERICAN CENTER, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, THE ATLANTIC MONTHLY COMPANY, NEW OREGON PUBLISHERS, INC. D/B/A OREGON MAGAZINE AND RANDOM HOUSE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., ET AL., AS *AMICI CURIAE,* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief, *amici curiae,* is submitted in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1] Letters from the parties, consenting to the submission of this brief, have been filed with the Clerk.

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1. The opinion of the Court of Appeals is reported at 595 F.2d 926.

Interests of the *Amici*

The organizations and firms participating in this brief as *amici curiae* represent many of the nation's leading publishers, authors, journalists and broadcasters. This diverse group has in common a dedication to the robust and unfettered freedoms of speech and of the press guaranteed by the First Amendment to the United States Constitution.

In *amici's* view, the decision of the Fourth Circuit in this case, expanding upon several earlier decisions of that Court,[2] strikes at the very heart of these preeminent First Amendment guarantees. In validating and rigorously enforcing secrecy agreements of the type entered into by Frank Snepp, the Fourth Circuit has sanctioned unprecedented restrictions on the First Amendment rights of government employees.

But the impact of the Fourth Circuit's ruling does not stop there. For these restrictions will surely impact as well on the free flow of information to the public concerning the operations of government.

Amici and their members, who gather and publish information concerning the workings of government, and the public as recipient of this information, are affected as surely as if they had been parties to the suit below. For example, several *amici* who—although not parties to secrecy agreements—wish to publish the writings of former government employees or officials, now find these works subject to the stultifying regimen of prior review and prior censorship sanctioned by the Fourth Circuit.[3]

2. *United States* v. *Marchetti,* 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972); *Alfred A. Knopf, Inc.* v. *Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975).

Also deeply troubling to *amici* is the possibility that *amici* or their members—although not "contractually" bound to submit to government censorship—could nonetheless, under the rationale and ruling of the court below, not only be "chilled" in their operations but also arguably be subjected to penalty for publishing, broadcasting or reporting upon government operations in alleged violation of the secrecy agreements.[4]

Finally, all of the *amici* and their members find in the Fourth Circuit's rulings the seeds of a state secrecy system—extending far beyond the internal confidences of the bureaucracy—at war with the constitutional preference for open government and the free discussion of government affairs.

3. A discussion of the direct impact of the present suit upon *amici* Atlantic Monthly Company, New Oregon Publishers, Inc. d/b/a Oregon Magazine and Random House, Inc. is found *infra* at 11-12, 12 n.10 and 17 n.12.

4. As is more fully discussed in Point II(C) below, the sweeping language of the injunction approved by the court below would by its terms seemingly apply to any third party who knowingly receives such information in violation of the pre-submission requirement. Thus, the District Court's Order permanently enjoins not only Frank Snepp, but also his "agents . . . and those persons in active concert or participation with him . . . from further breaching . . . [his] Secrecy Agreement . . . by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency . . . for Agency review prior to publication." (Order of August 2, 1978)

Statement of the Case

This case represents the culmination of a series of cases decided by the Fourth Circuit, thus far unreviewed by this Court, in which the First Amendment was deemed subordinate to an employment agreement.

In *United States* v. *Marchetti, supra,* the Fourth Circuit first confronted the issue of the enforceability of government secrecy agreements. Given impetus from the planned disclosure of *classified* materials by former CIA agent Victor Marchetti and according controlling significance to an asserted governmental "Right to Secrecy" concerning such classified matters, 466 F.2d at 1315, Chief Judge Haynsworth there upheld an unprecedented lifelong injunction restraining Marchetti from publishing—uncensored—his written views concerning the CIA.

Thereafter, when the CIA's attempt to excise more than 300 assertedly classified items from Marchetti's book was challenged by Marchetti and his publisher, the Fourth Circuit expanded the reach of its judgment, holding that the court could not review *de novo* the propriety of the classification decisions that assertedly underlay the CIA's censorship demands. *Alfred A. Knopf, Inc.* v. *Colby, supra.*

The novel and overbroad prior restraint power won by the government in *Marchetti* and *Knopf*—cases involving publication of classified information by a former government employee—has in this case been expanded still further to apply to the publication, again by a former em-

ployee, of materials involving *no* disclosures of classified information. The Fourth Circuit has now ruled that the terms of the CIA's secrecy agreements may be enforced so as to require that *all* materials sought to be published, whether containing classified information or not, whether relating to national security interests or not, must be submitted for prior review. And, to assure petitioner's future submission to this censorship process, as well as to punish the petitioner and to serve a warning to others, the court both imposed a lifelong injunction upon the petitioner and authorized the imposition of confiscatory civil penalties, in the form of compensatory and punitive damages and, possibly, constructive trust recovery, arising out of the "breach" of petitioner's submission obligation.

Amici submit that the Fourth Circuit's ruling cannot be harmonized with the requirements of the First Amendment. In its apparent effort to defer to the interests which may properly be served by limited, internal administrative controls over the release of classified information, the Fourth Circuit has sanctioned a pervasive structure of government censorship and punishment reaching far beyond any which the government legitimately might require to achieve its ends and which, instead, impinges upon the constitutional freedoms of uncounted former government employees, the press and the public at large.

For these reasons and those reviewed below, it is vitally important for this Court to grant the petition for certiorari and overturn the decision of the Fourth Circuit.

Reasons for Granting the Writ

I.

The decision below conflicts with firmly-established First Amendment precedent.

The Fourth Circuit has evidenced little awareness of, or sensitivity to, lines of fundamental First Amendment precedent, the consideration of which is unavoidable in a case such as this. Relying solely upon the assessment of First Amendment concerns undertaken in the *Marchetti* and *Knopf* cases—opinions themselves notably devoid of clearly articulated First Amendment analysis[5]—the court below

5. In *Marchetti*, the Fourth Circuit acknowledged that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." 466 F.2d at 1313. Beyond this fundamental recognition, however, the court failed to analyze the controlling constitutional precedents—adverted to herein—which should have guided the court's ultimate determination as to the enforceability of the secrecy agreements there (and here) involved. Indeed, in its *Knopf* ruling, the Fourth Circuit demonstrated the flawed nature of its constitutional analysis when, despite its earlier pronouncement, the court summarily concluded that the petitioner had "effectively relinquished his First Amendment rights" by entering into the secrecy agreements. 509 F.2d at 1370.

Numerous commentaries have criticized the manner in which the *Marchetti* and *Knopf* decisions resolved the required balancing of the competing First Amendment and governmental interests here at stake. And the decision below greatly increases the constitutionally-suspect impact of these earlier rulings. *See, e.g.*, Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1078-79 (1973); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1294-95 (1976); Ryan, *United States* v. *Marchetti and Alfred A. Knopf, Inc.* v. *Colby: Secrecy 2; First Amendment 0*, 3 Hastings Const. L. Q. 1073 (1976); Note, *Constitutional Law—Prior Restraint Enforced Against Publication of Classified Material by CIA Employee*, 51 N. C. L. Rev. 865 (1973); *cf.* F.O. Wilcox and R.A. Frank, eds., *The Constitution and the Conduct of Foreign Policy: An Inquiry by a Panel of the American Society of International Law* 9-10 (1976).

concluded, without apparent difficulty, that "the secrecy agreements that bound [petitioner] did not violate his First Amendment rights." 595 F.2d at 932. Indeed, Judge Hoffman, concurring on the constitutional issue, went so far as to state that, "in light of the two *Marchetti* cases, the First Amendment claim is *patently frivolous.*" *Id.* at 942 (emphasis added).

The Fourth Circuit's failure adequately to consider controlling First Amendment precedent established by this Court in resolving the competing demands of the First Amendment and a system of government censorship has here resulted in undue deference to the government's claims at the expense of First Amendment expression. This failure to address the necessary constitutional considerations pertaining to issues of such importance and potential impact requires that the writ be granted.

A. The Presumption Against Prior Restraints

Without satisfactory analysis, the Fourth Circuit has approved the imposition of a far-ranging system of prior restraints. Petitioner, now a private citizen, has been subjected to a lifelong injunction requiring him to submit writings prior to publication for review and possible censorship by the CIA. This judicially-enforced submission obligation represents a classical prior restraint. *Near* v. *Minnesota*, 283 U.S. 697 (1931). Additionally, the enforcement of this submission obligation through contract, constructive trust and punitive damage remedies of the type made available to the government by the Fourth Circuit also amounts to nothing less than a prior restraint of expression. *Smith* v. *Daily Mail Publishing Co.*, —— U.S. ——, 47 U.S.L.W. 4824 (June 26, 1979).

Yet, despite the "heavy presumption against [the] constitutional validity" of such prior restraints, *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963), the "heavy burden" upon the government to justify their imposition, *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971), and the notable historical inability of the government even in far more compelling circumstances to meet its constitutional burden, *New York Times Co.* v. *United States,* 403 U.S. 713 (1971),[6] the court below approved the system of prior restraint outlined above without as much as a passing reference to the "prior restraint" line of cases.

B. The First Amendment Rights of Government Employees

The Fourth Circuit's implicit theory of "waiver" of First Amendment rights by virtue of government service resulted in the court's failure to consider the additional line of precedent which makes clear, to the contrary, that one's status as a government employee does not thereby result in the waiver of one's constitutional rights. *See, e.g., Elrod* v. *Burns,* 427 U.S. 347 (1976); *Cole* v. *Richardson,* 405 U.S. 676 (1972). Indeed, these cases note that, in the public employment context, as in any other, "a significant impairment of First Amendment rights must survive exacting scrutiny," and must be pursued by "means closely drawn to avoid unnecessary abridgement." *Elrod* v.

6. Neither did the lower court give adequate consideration, in this connection, to whether the system of prior restraints imposed on petitioner by the CIA was one explicitly authorized by statute, as the cases decided by this Court have suggested is a significant factor in any effort at prior government censorship. *See New York Times Co.* v. *United States,* 403 U.S. 713, 731 (1971) (White, J., concurring); *Greene* v. *McElroy,* 360 U.S. 474 (1959).

Burns, supra, 427 U.S. at 362-363; *Abood* v. *Detroit Board of Ed.,* 431 U.S. 209, 259-60, *rehearing denied,* 433 U.S. 915 (1977).

It is readily apparent that the requirement to submit *all* information with *any* relation to the CIA (even information in the public domain) for pre-publication review, applied against current *and former* employees, upon penalty of contempt of court and severe and punitive damage penalties for failure to comply, was not the result of "exacting" judicial "scrutiny," nor of any effort by the Fourth Circuit to confine the system of censorship to "means closely drawn to avoid unnecessary abridgement."

II.

The decision below has broad implications for speech and press freedoms.

The failure of the court below to have considered controlling First Amendment case law has resulted not only in the disregard of petitioner's constitutional rights, but also in the disregard of the broader First Amendment interests here at stake. These far-reaching implications of the Fourth Circuit's decision alone require that the writ be granted.

A. Impact Upon Expression at the "Heart" of the First Amendment

As recently as last term, this Court reiterated that "a major purpose of [the First] Amendment was to protect the free discussion of government affairs." *First Na-*

tional Bank of Boston v. *Bellotti,* 435 U.S. 765, 776-777 (1978), *citing Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). For, as this Court has noted, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 777 n.12, *citing Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). Those who would seek to limit discussion at the very "heart" of the First Amendment's guarantees and purposes have been required, in recognition of these principles, to make a compelling showing in favor of secrecy, lest "those in power" succeed in suppressing "competing views on public issues 'from diverse and antagonistic sources.'" *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 777 n.12, *citing Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). In sanctioning and rigorously enforcing the CIA's all-encompassing administrative system of prior review and censorship, the Fourth Circuit quite clearly displayed little sensitivity to the high value this Court has attached to such expression.

B. Impact Upon Other Government Employees

Petitioner is but one of many thousands of government employees potentially subject, as a result of the Fourth Circuit's ruling, to a lifelong prior restraint on expression relating to any information obtained while in government employ. Many federal agencies already require employees to sign "secrecy" agreements of one kind or another.[7]

7. Thus, agreements requiring pre-publication review similar to the ones signed by Frank Snepp at the CIA are required by the FBI, the Defense Intelligence Agency and possibly the National Security Agency/Central Security Service (NSA's agreements are themselves classified and not generally accessible). Many other agencies

(footnote continued on next page)

Still other governmental agencies enjoy the authority to classify documents, but have not yet utilized secrecy agreements.[8]

Given the additional fact that classification judgments have historically been notoriously overbroad, affecting millions of documents not significantly related to national security interests, the Fourth Circuit's ruling that such agreements, oaths, etc., carry with them express or implied lifelong obligations of silence and/or pre-screening by the government has laid the foundation—and provided the incentive—for an all-encompassing network of enforceable prior restraints covering a multitude of documents and thousands or even millions of government employees.

C. Impact Upon Third Parties, Including the Press

Another of the significant burdens on free expression implicit in the Fourth Circuit's decision is its potential impact on the rights of independent third parties, including publishers, authors, journalists or broadcasters.

require secrecy agreements with regard to classified information that expressly carry over into the post-employment period. These include the Department of State, AID, the International Communications Agency (formerly the USIA), the Bureau of Intelligence and Research, the Department of Treasury, the Department of Energy and various branches or components of the Department of Defense. Still other agencies utilize varying types of "Security Acknowledgements," "Security Agreements," "Security Briefing Statements," "Security Termination Statements," "Nondisclosure Agreements" or similar forms of oaths, affirmations or agreements acknowledging obligations of secrecy or confidentiality with regard to classified information. Some of these include the Nuclear Regulatory Commission, the Department of Justice, Energy Research and Development Administration, and the Defense Intelligence Service.

8. Under present Executive regulations, over 28 different agencies and governmental officials have the authority to classify documents originally. (Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978), *reprinted in* 50 U.S.C.A. § 401 (West Supp. 1978)).

These are not merely theoretical concerns. For example, one of the *amici,* Random House, Inc., as of this very date, is a party to a contract to publish two books by petitioner, one a fictional account of the experiences of a CIA agent and the other concerning this litigation. The outstanding injunction against petitioner is so overbroad that were Random House to publish one or more of these works prior to their review by the CIA, it is arguable that not only the petitioner, but Random House as well, would be subject to legal penalties under the reasoning of the Fourth Circuit—for having done no more than publish information fully protected by the First Amendment.[9] Indeed, under the present injunction, Random House is not even permitted to receive any such material written by Snepp. The mere potential for such results bespeaks the "chilling" impact on speech and press freedoms brought about by the ruling below.[10]

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9. The consequences of third party non-compliance with the prescreening and censorship apparatus sanctioned by the Fourth Circuit arguably include criminal contempt of court for knowing violation when a judicial injunction is in effect (with no opportunity to challenge the validity of the underlying order), or a civil action on a theory of inducing, or aiding and abetting, the alleged "breach of contract" or knowing complicity in a "breach of trust."

10. Other examples might equally be cited, such as the fictional article of the petitioner sought to be published by *amicus* Atlantic Monthly. That article, along with another, was determined by the District Court to be subject to submission to the CIA for pre-publication review under the terms of the permanent injunction in this case—thus posing the same legal uncertainties upon Atlantic Monthly as have been presented to Random House. *See also* cases cited *infra* at 17 n.12, including complaint instituted by *amicus* New Oregon Publishers, Inc. d/b/a Oregon Magazine.

D. Impact Upon the Public's Right to Receive Information

Finally ignored by the Fourth Circuit was the significant right of the public to receive information and ideas of the type sought freely to be communicated by petitioner. As this Court has consistently recognized, the protection the First Amendment affords "is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 756 (1976). *See also Procunier* v. *Martinez,* 416 U.S. 396 (1974); *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 783. The public's right to know can only be fully effectuated if willing speakers—such as petitioner—are not unduly encumbered by overreaching government censorship and if the press is able to perform its assigned function of securing and then publishing or broadcasting uncensored information from such willing sources about the operations of government, a process placed in doubt by the decision below.[11]

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11. It should be borne in mind that this is not a case of stolen government documents or confidential information prepared by the government for other purposes and somehow "misappropriated" for personal financial gain or other improper motives. On the contrary, this case involves the creative endeavors of a former employee—a personal account incorporating reflections, opinions and criticism based upon personal experience and recollection. The government does not "own" these manuscripts or the ideas expressed in them although it has now obtained the right to control and censor them. For similar reasons, this case should not be viewed as one depending upon an asserted First Amendment right of "access" to information that is controlled by the government. *Cf. Gannett Co., Inc.* v. *DePasquale,* —— U.S. ——, 47 U.S.L.W. 4902 (July 2, 1979).

III.

The subsequent remedies sanctioned by the decision below impermissibly chill First Amendment expression.

"[E]ven when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." *Smith* v. *Daily Mail, supra,* 47 U.S.L.W. at 4825. Here, the Fourth Circuit has crafted—over and above the injunction imposed and without serious consideration of the requisite demonstration of necessity—a unique and unprecedented set of "subsequent" punitive remedies. Indeed, these remedies were made available specifically to "deter" and "punish" petitioner's exercise of First Amendment rights, albeit in alleged violation of the secrecy agreements. 595 F.2d at 937.

Thus, the Fourth Circuit held that the government can recover a compensatory award for "breach" of the secrecy agreements to the extent that it was able to prove "quantifiable" damages. *Id.* at 936. If the government could not quantify its damages, it nonetheless would be entitled to "nominal damages." *Id.* In addition, and despite the general rule in contract cases, the Fourth Circuit held that the government could recover punitive damages in amounts unrelated to the actual damage, if any, sustained by the government. *Id.* at 937. Finally, although it reversed the "constructive trust" ordered by the District Court in this case, the court held that a constructive trust over all revenues from publication could be imposed were

it shown that "classified" information had been revealed. *Id.* at 936.

The same infirmities which characterize the Fourth Circuit's approach to injunctive relief—in terms of the weighing of First Amendment interests—are reflected in the court's sanctioning of this range of onerous subsequent penalties. This compounding of the constitutional error committed by the court below also requires that the writ be granted.

A. The Availability of Punitive Damages

This Court has made clear on a number of occasions that punitive damage awards are subject to similar constitutional scrutiny as are prior restraints, since such punishment offers the potential to "inhibit the vigorous exercise of First Amendment freedoms," and to "punish expressions of unpopular views." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349, 350 (1974). *See also IBEW* v. *Foust,* —— U.S. ——, 47 U.S.L.W. 4600, 4601-02 (May 29, 1979); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 83, 84 (1971) (Marshall, J., dissenting) (unbridled discretion to award damages in a First Amendment case allows the trier of fact "to penalize heavily the unorthodox and the unpopular" and "presents obvious and basic threats to society's interest in freedom of the press"). The court below failed to require the government to make a compelling showing of the propriety of punitive damages in the face of these First Amendment considerations. *Cf. Smith* v. *Daily Mail, supra.*

B. The Availability of a Constructive Trust

The Fourth Circuit's "constructive trust" ruling also has substantial "chilling" implications for the exercise of First Amendment rights, including those of non-contracting third parties. The court ruled that the constructive trust remedy would be available with regard to any future disclosure of classified material—a disclosure which, in its view, would amount to the breach of a "fiduciary duty." *Id.* at 936. However, the Fourth Circuit failed to consider the far-reaching implications of such a remedy as applied to non-contracting third parties, such as publishers exercising their First Amendment right to publish truthful information. Thus, under the general law of constructive trusts, not only the contracting employee, but also any third party publisher or other person who knowingly publishes information obtained by a government employee could arguably be compelled to hold *all* revenues acquired—including those of the publisher—for the benefit of the government, despite the fact that the publisher was not a party to any secrecy agreement and the publisher's activities were fully protected by the First Amendment. *See* Restatement (Second) on Trusts §§ 288, 291 (1959).

IV.

A conflict among the Circuits on these vitally important issues may never be presented.

For almost seven years the Fourth Circuit has, in this case and in the earlier *Marchetti* and *Knopf* cases, constructed and then expanded upon the unprecedented system of government censorship outlined above. In crafting

this unique law of government secrecy agreements, the Fourth Circuit has stood alone among the Circuit Courts of Appeals. No other court has spoken, and it is possible that no other court will soon speak, on these important issues.

Thus, the government has chosen to commence all enforcement proceedings concerning secrecy agreements of the type at issue here in the Fourth Circuit. While several private lawsuits have been instituted elsewhere, one was transferred to the Fourth Circuit on the government's motion and two others have been defended by the government in such a manner as to make unlikely an authoritative decision on the merits not controlled by Fourth Circuit precedent.[12]

Accordingly, the questionable body of law developed by the Fourth Circuit on these important issues effectively stands as the law of the land, with its attendant nationwide impact on the exercise of First Amendment rights. That impact will remain, and grow, absent this Court's review of this case.

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12. *See New Oregon Publishers, Inc. d/b/a Oregon Magazine* v. *United States,* Civ. No. 79-363 (D. Ore. 1979) (complaint instituted by *amicus* New Oregon Publishers, Inc. to overturn CIA magazine censorship dismissed as moot based in part on the government's decision not to seek judicial enforcement of the secrecy agreement); *Alfred A. Knopf, Inc.* v. *Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975) (affirmative action to challenge CIA book censorship, commenced in the Southern District of New York, transferred to the Eastern District of Virginia on the government's motion); *cf. McGehee* v. *Turner,* 78 Civ. 2407 (D.D.C.) (complaint filed for declaratory relief by ex-CIA agent).

Conclusion

For the foregoing reasons, the Court should grant the writ of certiorari and, upon that grant, reverse the judgment of the Court of Appeals.

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